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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/775,431	02/01/2001	Paul Gardiner	11411/110	7031

26646 7590 06/30/2003

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EXAMINER
BAHAR, MOJDEH

ART UNIT	PAPER NUMBER
1617	15

DATE MAILED: 06/30/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/775,431	GARDINER ET AL.	
	Examiner	Art Unit	
	Mojdeh Bahar	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *22 April 2003* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-7,11-15 and 44-47* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7, 11-15, 44-47* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other:

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on April 15, 2003, has been entered.

In the response, applicant cancels claims 8-10, but in the remarks applicant mentions that claims 8-10 are amended. Note that these claims are deemed cancelled. Applicant also notes that claim 44 has been added. Note that claims 44-47 have been added. Also note that the marked up version of the amendment refers to new claims 44-47 as claims 48-51. Appropriate correction is required.

Claims 1-7, 11-15 and 44-47 are herein examined on the merits.

Applicant's amendment to claim 1 is persuasive to remove the rejection under 35 USC 102 in the previous office action.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-7, 11-15 and 44-47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Paul et al. (US 5,292,538) in view of Riley (USPN 5,976,568), reference submitted in the IDS of 02/21/02.

Paul et al. (US 5,292,538) discloses a nutritional composition comprising glucose polymers, lactalbumin (whey protein), amino acid ligands (e.g. zinc arginate), potassium, phosphorus, alpha-ketoglutarate (within the claimed range), lipoic acid, vitamin C and Inositol, see claims and table columns 10-12, see also col. 4 lines 53-66.

Paul et al. does not teach the exact amount of lipoic acid claimed herein.

Riley (USPN 5,976,568) teaches a nutritional supplement comprising from about 0.0 mg to about 750 mg of alpha lipoic acid, see claim 1, col. 29.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ from about 0.0 mg to about 750 mg of alpha lipoic acid in the nutritional supplement of Paul et al.

One of ordinary skill in the art would have been motivated to employ from about 0.0 mg to about 750 mg of alpha lipoic acid in the nutritional supplement of Paul et al. because optimization of amounts is within the purview of the Skilled Artisan. Furthermore as taught by

Riley, from about 0.0 mg to about 750 mg of alpha lipoic acid is known to be used in nutritional supplement compositions.

Response to Arguments

Applicant's arguments filed April 15, 2003 have been fully considered but they are not persuasive. Applicant argues that there is no motivation to combine the teachings of Paul et al. with those of Riley. Applicants believe that the motivation is based on impermissible hindsight. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant further argues that the lipoic acid in Paul and Riley is employed as an anti-oxidant and not to increase muscle mass. Note that the claims herein are all drawn to compositions, and not methods of use. The recitation of intended use does not further limit a claim drawn to a composition. Note further that the composition of Paul includes all the ingredients recited herein. The only difference between the Paul reference and the claims herein is the amount of lipoic acid. Riley is employed to show that the amounts of lipoic acid employed in the instant composition is known in the art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The

examiner can normally be reached on (703) 305-1007 from 8:30 a.m. to 6:30 p.m. Monday, Tuesday, Thursday and Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan., can be reached on (703) 305-1877. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar
Patent Examiner
June 22, 2003

SREENI PADMANABHAN
PRIMARY EXAMINER
6/24/03